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ERIC JOHNSON

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ERIC JOHNSON, Plaintiff, - against - WHIP NETWORKS, INC., Defendant.	Civil Action No. 1:17-cv-4815 **COMPLAINT**

COMPLAINT

Mr. Eric Johnson (hereinafter "Plaintiff"), by and through his undersigned counsel, for his Complaint against Whip Networks, Inc. ("Defendant"), states and alleges as follows:

1. Plaintiff Eric Johnson is a professional photographer and artist based in Manhattan, New York.

2. Upon information and belief, Defendant is a corporation with its principal place of business in Santa Monica, California.

3. Upon information and belief, Defendant owns and operates a website known as www.realcoolnation.com (the "Website").

4. Without permission or authorization from Plaintiff, Defendant copied, modified, distributed and displayed certain original copyright-protected photographs of the recording artists Aaliyah and Notorious B.I.G. & Faith Evans created and exclusively owned by Plaintiff (the "Photographs At Issue," reproduced at Exhibit 1 hereto) on its Website knowingly and in willful violation of the United States copyright laws.

JURISDICTION AND VENUE

5. This is an action for copyright infringement arising under the Copyright Act of 1976, as amended, 17 U.S.C. § 101 *et seq.* (the "Copyright Act"). This action arises from Defendant's unauthorized and unlawful reproduction, distribution, and public display of certain copyrighted photographs owned by Plaintiff (reproduced at Exhibit 1), in willful infringement of Plaintiff's U.S. Copyright Registration Nos. VA 1-929-530 & VA 1-910-544.[1]

6. This Court has subject matter jurisdiction pursuant to 17 U.S.C. § 501 and 28 U.S.C. §§ 1331 and 1338(a).

7. This Court has personal jurisdiction over Defendant because Defendant engages in continuous and systematic business activities in the State of New York and/or has purposely directed substantial activities at the residents of New York by means of the Website described herein and derives substantial revenue from interstate commerce. *See Penguin Group (USA) Inc. v. Am. Buddha*, 16 N.Y.3d 295 (2011).

8. Venue is proper under 28 U.S.C. § 1391(a)(2) because Defendant does business in this Judicial District and/or because a substantial part of the events giving rise to the causes of action alleged herein occurred in this Judicial District and the injury suffered by Plaintiff took place in this Judicial District.

[1] Copies of the Certificates of Registration are attached hereto at Exhibit 2 and 3.

THE PARTIES

9. Plaintiff Eric Johnson is a citizen of the State and County of New York, with his residence and principal place of business located in Manhattan, New York.

10. Upon information and belief, Defendant Whip Networks, Inc. is a Delaware corporation having a principal place of business at 1841 Centinela Avenue, Santa Monica, California, 90404.

FACTUAL ALLEGATIONS

A. THE PLAINTIFF AND HIS COPYRIGHTED PHOTOGRAPHS OF NOTORIOUS B.I.G. & FAITH EVANS AND AALIYAH

11. Plaintiff is a successful, award-winning photographer and artist. He is a citizen of the State of New York and resides in the Borough of Manhattan.

12. A major focus of Plaintiff's work is photographic portraiture. Plaintiff has been producing iconic photographic portraits of a wide, diverse group of musicians, artists, celebrities, personalities, and everyday individuals for over thirty years. His photographs have been published in countless books, magazines, newspapers and periodicals, used as cover artwork for music albums, and shown in gallery shows.

13. Plaintiff has developed a pristine reputation over his career for his timeless creative vision, masterful instinct for lighting, angles, and perspective, and unfailing ability to put his subjects at ease in front of the camera, all of which has translated to his consistent production of photographic portraits of the highest caliber throughout his thirty-year career. Many of Plaintiff's more well-known portraits have become truly etched into the public consciousness, and have played an integral role in establishing the look and style of popular culture over the last thirty years.

14. Plaintiff is the legal and beneficial owner of a vast number of his original photographs, certain of which he has licensed and/or sold, and many of which he has not licensed or sold and instead has maintained in his private personal archive since their creation. Plaintiff has invested significant time, money, resources and manpower over his distinguished and longstanding career in building and maintaining his personal photograph archive.

15. In July 1995, Plaintiff shot a series of photographs of the recording artists Notorious B.I.G. and Faith Evans on commission for Vibe Magazine (the "BIG/Evans Photographs").[2]

16 In June 2001, Plaintiff shot a series of photographic portraits of the recording artist and actress Aaliyah on commission for Entertainment Weekly Magazine (the "Aaliyah Photographs").[3]

17. During his photo shoots with Notorious B.I.G. & Faith Evans and Aaliyah, Plaintiff utilized his talents, expertise, and creative vision to capture a number of intimate, timeless shots of the stars – including certain photographs that have come to define the enduring images of the late recording artists Notorious B.I.G. and Aaliyah among the public and their devoted fans.

18. Plaintiff offered to license the BIG/Evans Photographs to Vibe Magazine for distribution to the public in its print magazine on or about July 25, 1995. Vibe Magazine thereafter licensed from the Plaintiff the right to publish certain of the BIG/Evans Photographs in its print magazine.

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[2] The certificate of copyright registration covering the BIG/Evans Photographs (U.S. Reg. No. 1-929-530), which identifies Plaintiff as author and copyright claimant, is attached hereto at Exhibit 2.

[3] The certificate of copyright registration covering the Aaliyah Photographs (U.S. Reg. No. VA 1-910-554), which identifies Plaintiff as author and copyright claimant, is attached hereto at Exhibit 3.

19. Plaintiff offered to license the Aaliyah Photographs to Entertainment Weekly Magazine for distribution to the public in its print magazine on or about June 7, 2011. Entertainment Weekly Magazine thereafter licensed from Plaintiff the right to publish certain of the Aaliyah Photographs in its print magazine.

20. Plaintiff is and has been the sole owner of all copyright rights in all of the BIG/Evans Photographs and Aaliyah Photographs (including, without limitation, the Photographs At Issue reproduced at Exhibit 1) at all times since their creation. None of the BIG/Evans Photographs or Aaliyah Photographs were produced as works-made-for-hire. Plaintiff has not assigned or otherwise transferred his copyrights in any of the BIG/Evans Photographs or Aaliyah Photographs to any other person or entity.

21. Plaintiff has secured U.S. copyright registrations covering each of the BIG/Evans Photographs and Aaliyah Photographs (including, without limitation, the Photographs At Issue reproduced at Exhibit 1), the certificates of registration for which are attached hereto at Exhibits 2 and 3.

B. THE DEFENDANT AND ITS BUSINESS OPERATIONS

22. Upon information and belief, Defendant Whip Networks, Inc. is a major digital media and content provider and distributor whose business operations involve, *inter alia*, the ownership and operation of the Website.[4]

23. Upon information and belief, Defendant is the registered owner and operator of the Website and is responsible for all of the content (including, without limitation, photographic images) publicly displayed on the Website.

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[4] *See* the "Terms of Service" page on the Website (http://realcoolnation.com/terms), a true and correct copy of which (as of the filing of this action) is reproduced at Exhibit 4, which indicates that the Website is a service provided by Defendant.

24. Upon information and belief, Defendant provides technological means on the Website by which users can reproduce content displayed thereon, including photographic images, and distribute and publicly display such content on social media platforms including, *inter alia*, Facebook and Twitter.

25. Upon information and belief, the Website is monetized in that it contains paid advertisements and/or markets the services of Defendant to the public, including to persons located in the State of New York.

26. Upon information and belief, Defendant derives substantial revenues from the sale of banner advertising space and sponsorship advertisements distributed and displayed on the Website.

27. Upon information and belief, Defendant's advertising revenues from the sale of banner advertising space and sponsorship advertisements on the Website are determined on the basis on the number of user views and "clicks" of web pages on which such advertisements appear.

28. Upon information and belief, Defendant receives substantial monetary benefits from its ownership and operation of the Website and its marketing and offering of advertising services thereon.

29. Upon information and belief, Defendant takes an active role in selecting content to appear on the Website by, *inter alia*, selecting, reproducing, publicly displaying, and distributing photographic images thereon, employing moderators, administrators, and editors ("Employees") who, within the scope of their employment, select and control content – including photographic images – to display on the Website, and directing, controlling, ratifying, and/or

participating in such Employees' selection of content – including photographic images – to be reproduced, publicly displayed, and distributed on the Website.

30. Upon information and belief, Defendant and/or Defendant's Employees deliberately select photographic images to reproduce, distribute, and publicly display on the Website with the intention of drawing user traffic to the Website and thereby realizing greater advertising revenues and a greater enticement to prospective advertisers who compensate Defendant to displays advertisements on the Website.

31. Upon information and belief, Defendant profits from its ownership and operation of the Website and, specifically, from the reproduction, distribution, and public display of photographic images on the Website.

C. DEFENDANT'S INFRINGEMENTS OF PLAINTIFF'S COPRIGHTED PHOTOGRAPHS

32. Upon information and belief, at all times relevant to this dispute, Defendant has owned and operated the Website and has been responsible for all of the content – including, without limitation, all of the photographic images – reproduced, distributed, and publicly displayed on the Website.

33. Upon information and belief and as evidenced by the screen captures of Defendant's Website reproduced at Exhibit 5 hereto, Defendant and/or Defendant's Employees acting within the scope of their employment have willfully infringed Plaintiff's copyright rights in and to three of the Aaliyah Photographs and one of the BIG/Evans Photographs (the "Photograph At Issue," which is reproduced at Exhibit 1 hereto) by reproducing, distributing,

and publicly displaying such photograph on the Website,[5] without valid license, permission, or authorization.

34. None of Defendant's aforementioned uses of the Photograph At Issue on the Website credit Plaintiff in any manner.

35. Upon information and belief, Defendant was not validly licensed, authorized, or given permission by Plaintiff or any authorized agent thereof to engage in any use of the Photograph At Issue on the Website.

36. Upon information and belief, Defendant had no good-faith reason to believe that any of its uses of the Photographs At Issue on the Website were licensed or authorized by Plaintiff, any authorized agent thereof, or the law at the times of commencement thereof. Accordingly, Defendant knew or should have known that each of its uses of the Photographs At Issue on the Website constituted copyright infringement at the times of commencement thereof.

37. Upon information and belief, the infringing uses of the Photographs At Issue on the Website were reproduced, distributed, and publicly displayed thereon by Defendant and/or Defendant's Employees acting within the scope of their employment. None of the infringing uses of the Photographs At Issue on the Website were reproduced, distributed, or publicly displayed on the Website at the direction of a "user" as defined under 17 U.S.C. § 512.

38. Upon information and belief, Defendant was aware and/or should have been aware that the Photographs At Issue are Plaintiff's original copyright-protected works.

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[5] Screen captures of the web pages on the Website on which Defendant has reproduced, distributed, and publicly displayed the Photograph At Issue, each created on June 26, 2017, the date of filing of this action, are reproduced at Exhibit 5. Each of the web page screen captures reproduced at Exhibit 5 depicts the reproduction, distribution, and public display of an exact reproduction of one of the Photographs At Issue (reproduced at Exhibit 1) on the Website.

39. Upon information and belief, Defendant and/or Defendant's Employees purposely reproduced, distributed, and publicly displayed the Photographs At Issue on the Website with knowledge of their renown among the public and the devoted fans of Notorious B.I.G. and Aaliyah, with the intention of attracting user traffic to the Website by their visibility thereon, thereby increasing advertising revenues and promotion of Defendants' advertising services offered thereon.

40. Upon information and belief, Defendant has driven significant user traffic to the Website by the reproduction, distribution, and public display of the Photographs At Issue thereon. The increased user traffic to the Website has led to the generation of substantial revenues and promotional benefits reaped by Defendant, including, but not limited to, advertising revenues from increased user traffic, views, and clicks, and a greater enticement to prospective advertisers to enter into advertising relationships with Defendant for the display of advertisements on the Website – all at the expense of Plaintiff and his copyright interests in the Photographs At issue, and all directly attributable to Defendant's infringements of Plaintiff's copyrights in and to the Photographs At Issue.

41. Upon information and belief, technological means provided on the Website by Defendant has allowed users of the Website to engage in further unauthorized reproduction, distribution, and public display of the Photographs At Issue on social media platforms including, *inter alia*, Facebook and Twitter. Upon information and belief, a substantial number of users of the Website have made use of such technological means to engage in unauthorized reproduction, distribution, and public display of the Photographs At Issue.

42. Plaintiff discovered Defendants' above-described infringing uses of the Photographs At Issue in or about May 2017. Upon and since such discovery, Plaintiff's legal

counsel repeatedly notified Defendant of Plaintiff's rights in and to the Photographs At Issue and Plaintiff's legal claims with respect to Defendant's unauthorized uses thereof on the Website in an attempt to amicably resolve this dispute.

43. Despite Defendant being put notice of Plaintiff's rights in and to the Photograph At Issues and Plaintiff's legal claims with respect to Defendant's use thereof, as of the date of filing of this Complaint, Defendant's infringing uses of the Photographs At Issue remain reproduced, distributed, publicly displayed, and available for further unauthorized reproduction, distribution, and public display on and through the Website, in blatant and brazen disregard for Plaintiff's copyright rights.[6]

44. Upon information and belief, at all times material hereto, Defendant has had the means and ability to prevent and put a stop to the reproduction, distribution, and public display of Plaintiff's Photographs At Issue on and through the Website, and yet, despite having been put on notice of Plaintiff's rights in and to the Photographs At Issue, has failed to do so. Accordingly, Plaintiff requires this Court's intervention to put a stop to Defendant's continued willful infringement of his copyrights in and to the Photographs At Issue, and to vindicate his legal rights under the U.S. Copyright Act.

45. Plaintiff has complied in all respects with Title 17 of the United States Code, secured the exclusive rights and privileges to the Photographs At Issue, and obtained the appropriate certificate of copyright registration, U.S. Copyright Reg. Nos. VA 1-929-530 & VA 1-910-544 (attached hereto at Exhibits 2 and 3).

46. Upon information and belief, Defendant engaged in the infringing acts forming the basis of this Complaint knowingly of, and with reckless disregard for, Plaintiff's rights in the

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[6] The screen captures reproduced at Exhibit 5 each depict the continuing reproduction, distribution, and public display of the Photograph At Issue on the Website as of June 26, 2017.

Photographs At Issue, and was aware and/or should have been aware that its infringing activities constitute infringements under the Copyright Laws of the United States.

47. Upon information and belief, Defendant has engaged in its illicit reproduction, distribution and public display of Plaintiff's Photographs At Issue for the purpose of profiting and benefiting therefrom.

48. As a result of Defendant's willful misconduct described herein, Plaintiff has been substantially harmed, including, but not limited to, loss of licensing fees, opportunities, sales, profits, and benefits, diminution of the value of his copyright rights in the Photographs At Issue, erosion of the marketing and licensing value of the Photographs At Issue, and injury to Plaintiff's goodwill and reputation, all in amounts to be determined at trial.

49. Plaintiff no adequate remedy at law. Defendant's infringing acts as described above have caused and, if not enjoined, will continue to cause irreparable harm to Plaintiff.

FIRST COUNT
Direct Copyright Infringement

50. Plaintiff repeats and reincorporates the allegations contained in the preceding paragraphs as though set forth in full herein.

51. At all times herein, Plaintiff has been and is still the owner, and proprietor of all right, title and interest in and to the Photographs At Issue. The Photographs At Issue is an original, creative works of Plaintiff's authorship and constitutes copyrightable subject matter under the Copyright Act.

52. Plaintiff has complied in all respects with Title 17 of the United States Code, including obtaining the appropriate certificates of copyright registration (attached at Exhibits 2 and 3).

53. Plaintiff has not licensed Defendant the right to use any of the Photographs At Issue in any manner, nor has Plaintiff assigned any of its exclusive rights in his copyrights in any of the Photographs At Issue to Defendant.

54. Without permission or authorization from Plaintiff and in willful violation of his rights under 17 U.S.C § 106, Defendant improperly and illegally reproduced, distributed, and publicly displayed the Photographs At Issue on the Website.

55. Defendant's reproduction, distribution, and display of the Photographs At Issue on the Website violates Plaintiff's exclusive rights under the Copyright Act and constitutes willful infringement of Plaintiff's copyrights in and to the Photographs At Issue.

56. Upon information and belief, thousands of people throughout the United States have viewed the infringing copies of the Photographs At Issue on the Website.

57. Upon information and belief, Defendant has knowledge of the copyright infringements alleged herein, and has knowingly and willfully carried out its infringing activities and continues to do so subsequent to and despite being put on notice of Plaintiff's rights in and to the Photographs At Issue.

58. As a direct and proximate result of Defendant's misconduct, Plaintiff has been substantially harmed in an amount to be proven at trial.

SECOND COUNT
Vicarious Copyright Infringement

59. Plaintiff repeats and reincorporates the allegations contained in the preceding paragraphs as though set forth in full herein.

60. Upon information and belief, at all times relevant, Defendant has had the legal right and practicable ability to supervise, control, limit, and stop its Employees from engaging in the infringing reproductions, distributions, and public displays of the Photographs At Issue on

the Website described in this Complaint, and yet Defendant has declined and continue to decline to exercise such right and ability.

61. Upon information and belief, at all times relevant, Defendant has had the practicable ability to supervise, control, limit, and stop the infringing activities of its Employees during their process of reproducing, distributing, and publicly displaying photographic images on the Website to ensure that such activities did not involve infringement of Plaintiff's copyrights in and to the Photographs At Issue, and yet has permitted and continue to permit such Employees to engage in unauthorized reproduction, distribution, and public display of the Photographs At Issue on the Website – including subsequent to Defendant being put on notice of Plaintiff's rights in and to the Photographs At Issue.

62. Upon information and belief, as a direct and proximate result of Defendant's failure and/or refusal to exercise its right to stop or limit its Employees' infringements of the Photographs At Issue on the Website – including subsequent to Defendant being put on notice of Plaintiff's rights in the Photographs At Issue – Defendant's Employees have infringed and continue to infringe upon Plaintiff's rights in and to the Photographs At Issue.

63. Upon information and belief, as a direct and proximate result of Defendant's failure and/or refusal to exercise its right to stop or limit its Employees' infringements of Plaintiff's rights in and to the Photographs At Issue on the Website, Defendant's Employees have engaged and continued to engage in infringing uses of the Photographs At Issue on the Website, which, in turn, has resulted in greater user traffic to the Website generating significant profits and benefits for Defendant directly attributable to the infringing conduct of its Employees including, *inter alia*, increase in advertising revenues and a greater enticement to prospective

advertisers to enter into advertising relationships with Defendant for the display of advertisements on the Website.

64. Defendant's refusal to exercise its right to stop or limit its Employees' infringing uses of of the Photographs At Issue on the Website – including subsequent to Defendant being put on notice of Plaintiff's rights in and to the Photographs At Issue – has been willful, intentional, purposeful, and in complete disregard for Plaintiff's rights.

65. As a direct and proximate result of Defendant's refusal to exercise its right to stop or limit its Employees' infringing uses of the Photographs At Issue on the Website – including subsequent to Defendant being put on notice of Plaintiff's rights in and to the Photographs At Issue – Plaintiff has been substantially harmed in an amount to be proven at trial.

THIRD COUNT
Inducement of Copyright Infringement

66. Plaintiff repeats and reincorporates the allegations contained in the preceding paragraphs as though set forth in full herein.

67. Users who access the Website that Defendant owns, operates, distributes, and promotes, have been provided by Defendant with technological means to directly infringe, and have directly infringed, Plaintiff's copyrights in and to the Photographs At Issue, by creating, distributing, and publicly displaying unauthorized reproductions thereof on social media platforms including, *inter alia*, Facebook and Twitter.

68. By providing such technological means on the Website, Defendant has induced, caused, and/or materially contributed to infringements of the Photographs At Issue by users of the Website.

69. Upon information and belief, Defendant has provided such technological means for users of the Website to engage in infringing reproduction, distribution, and public display of the Photographs At Issue with knowledge of the infringing nature of such activities.

70. Defendant's infringing activities have been willful, intentional, purposeful, and in complete disregard of Plaintiff's rights, and has caused substantial damage to Plaintiff.

71. As a direct and proximate result of Defendant's infringing activities, Plaintiff has been substantially harmed in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendant, finding that Defendant has directly and vicariously infringed Plaintiff's U.S. Copyright Registration Nos. VA 1-929-530 & VA 1-910-544 in violation of the U.S. Copyright Act, 17 U.S.C. § 501 *et seq.*, and awarding Plaintiff monetary and injunctive relief as follows:

a. All damages sustained by Plaintiff in consequence of the infringements of Plaintiff's rights in and to the Photographs At Issue committed by Defendant and/or by Defendants' Employees with respect to whom Defendant failed and/or refused to exercise its legal right and practicable ability to stop or limit such infringements, as well as all gains, profits, and advantages realized by Defendant from said infringements, in amounts to be proven at trial and all increased to the maximum extent permitted by law; or in the alternative, at Plaintiff's election prior to entry of final judgment, statutory damages pursuant to 17 U.S.C. § 504(c), increased to the maximum extent permitted by law;

b. A permanent injunction pursuant to 17 U.S.C. § 502 enjoining Defendant as well as each of its agents, servants, employees, representatives, parent companies, subsidiaries, successors and assigns, as well as all persons, firms, and corporations in active concert or participation with any of them, from directly or indirectly infringing Plaintiff's U.S. Copyright Registration Nos. VA 1-929-530 & VA 1-910-544;

c. Plaintiff's reasonable attorneys' fees in this action pursuant to 17 U.S.C. § 505;

d. Plaintiff's costs in this action; and,

e. Such other and further relief that the Court determines to be just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all counts so triable.

Dated: June 26, 2017 By: ______________________

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